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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 774

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Respondent.

B. A. TURNER, ET AL., and BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Petitioners,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment of August 28, 1968 affirming judgments in two related actions in the United States District Court for the Western District of Kentucky at Louisville.

OPINION BELOW.

The opinion of the Sixth Circuit (A-1 herein) is reported in 490 F. 2d 572.

JURISDICTION.

The jurisdiction of this court is invoked under 28 U. S. C. § 1254.

STATUTES AND REGULATIONS INVOLVED.

Railway Labor Act, Section 2, First, Second, Third, Fourth, Seventh, and Ninth, 45 U. S. C. § 152, First, Second, Third, Fourth, Seventh, and Ninth, Sec. 5 and Sec. 6. These sections are set out at p. A. 38, *et seq.*

QUESTIONS PRESENTED FOR REVIEW.

1. A union served a notice under Section 6 of the RLA to establish a training program. The carrier, in bad faith, refused to negotiate and refused National Mediation Board (NMB) mediation invoked by the union. Instead it established a training and premotion program by agreement with a second union in direct conflict with its agreement with the first union. It utilized the training program and other means to influence trainees to join the second union, ~~to determine~~ the first union, to deprive it of new members, to flout its contract and, with the purpose ultimately to destroy it.

(a) Does a District Court have jurisdiction to grant injunctive relief under Section 2, First, Second, Third, Fourth or Seventh of the Railway Labor Act ("RLA")?

(b) Was it a violation of due process of law to dismiss the action summarily without giving the union an oppor-

tunity to prove the allegations of the complaint and to show the urgent need for equitable relief?

2. Does a District Court have authority, under Sec. 2, First, Second and Seventh, and Sec. 6, to enforce the carrier duty to bargain and to enforce the *status quo* provisions of RLA pending bargaining?

3. Did the Court of Appeals err in holding that the matter fell within the exclusive domain of NMB as a "jurisdictional dispute" between the two unions notwithstanding that:

(a) RLA § 2, Ninth restricts NMB authority to representation disputes only.

(b) Both the carrier and the second union sought an NMB ruling as to which union was authorized to negotiate on behalf of the apprentices. The NMB ruled that its authority to decide representation disputes under § 2, Ninth and otherwise, did not include power to decide such "jurisdictional" disputes. The courts below failed to consider this holding.

(c) NMB ruled the first union's Section 6 notice was a proper subject for mediation under §§ 5 and 6.

STATEMENT OF THE CASE.

The controversy is presented by two cases and related proceedings before the NMB.

In both cases the district court on motion to dismiss or equivalent motion in an answer dismissed the complaint for want of jurisdiction. The Court of Appeals affirmed both cases in a single opinion.

For the purpose of this petition, the factual background consists of allegations of complaints admitted by motions to dismiss and facts otherwise undisputed.

1. *Background, NMB Phase, and the First Action at Bar.*

The Brotherhood of Locomotive Firemen and Enginemen (BLF&E), a national railroad labor organization, represents all firemen of the Louisville and Nashville Railroad Company (L&N), and the Brotherhood of Locomotive Engineers (BLE), all of its engineers. For many years collective bargaining agreements have been in force between BLF&E and L&N and between BLE and L&N[1] (A. 15).

For years engine service employees have entered service as firemen. The BLF&E-L&N current agreement, which is similar to most such agreements throughout the country, provides that for promotion to engineer, firemen must have prescribed experience and pass examinations (A. 15).

On March 25, 1965, BLF&E served on L&N a notice under Section 6 of the RLA requesting L&N to negotiate with it regarding the establishment of a formal training program for firemen (A. 26). L&N refused to engage in serious negotiations. BLF&E invoked NMB mediation.

NMB docketed the matter as Case A-7829, and assigned a mediator, but the L&N refused mediation.

About one year later, however, L&N and BLE, on April 28, 1966, entered into a purported collective bargaining agreement (A. 16) (For text see Pltf. App., No. 18,479, 20a) with respect to "apprentice locomotive engineers." There was and is no group of L&N employees known as, or certified by NMB as, "apprentice locomotive engineers." From the start of railroading, firemen have been trained to become, and are the source of, engineers. Under the purported agreement, which simply fixed a rate of pay, L&N established a purported apprentice training program for

1. The RLA, Section 2, Eleventh (c), 45 U. S. C. Section 152, Eleventh (c), permits engine service employees to be members of either organization. Most firemen, however, are members of BLF&E and a majority of the engineers are members of BLE. Some engineers, however, are members of BLF&E and some firemen are members of BLE (No. 18,479, A. 7a).

engineers designed to pre-empt the training program proposed by BLF&E. There was and is little need, however, for L&N engineers, there being an adequate number of L&N "promoted firemen" (firemen promoted to engineer but working as firemen due to lack of engineer openings) (A. 17).

On June 6, 1966, the carrier filed a request with NMB alleging that "a jurisdictional issue has arisen" over "a training program for apprentice locomotive engineers (a non-existent class)" and requesting the Board to advise the carriers "as to which of the two disputing organizations may legally bargain for and on behalf of apprentice locomotive engineers." The carrier asserted that the Board had jurisdiction under RLA Section 5, First (the letter is quoted in the NMB reply of June 21) (A. 30).

The Board, after receiving voluminous submissions from the carrier and both unions, held on June 21, "The question as posed involved a question of representation. Such issues are resolved under Section 2, Ninth, of the Railway Labor Act. The application . . . is therefore dismissed." It set August 4 for mediation on the BLF&E Section 6 training program notice (A. 32).

The first case at bar was filed June 27, 1966 as Civil Action No. 5402 (No. 17,588 in the Court of Appeals). Plaintiff was BLF&E, defendant L&N and BLE intervenor defendant. Jurisdiction rested on the RLA and the Interstate Commerce Act, 49 U. S. C. § 1, *et seq.* (A. 6).

The complaint (A. 6) alleged: (1) A BLF&E-L&N long-standing agreement whereby firemen were promoted to engineer and set out the L&N-BLE "apprentice engineer" agreement. (2) L&N was implementing this agreement by making "apprentices" of switchmen, etc., and, BLF&E feared, L&N was about to place them on the engineer seniority roster contrary to the BLF&E-L&N agreement (A. 9). (3) By such acts, L&N intended to repudiate the

existing plan for fireman promotion in the BLF&E-L&N agreement (A. 8). (4) Such acts constituted a violation of the Section 2, First, RLA (carrier duty to make and maintain agreements) and Section 2, Seventh (duty to change agreements only pursuant to Section 6) (A. 10). Plaintiff asked injunctive relief (A. 11).

BLE sought ammunition to counter the BLF&E suit against L&N. NMB in its last communication had stated that the question "as posed" (see A. 32) involved a representation dispute under Section 2, Ninth, rather than a Section 5 dispute. Three days after the BLF&E suit was filed, BLE on July 1, filed a request for NMB services pursuant to Section 2, Ninth (A. 33). The ammunition proved unneeded. Before NMB could act on this latest request, on July 2, the District Court dismissed the BLF&E action for want of jurisdiction (A. 12). The court, in a brief opinion (A. 12) and its conclusions of law (Pltf. App. No. 17588 42a), held that the dispute was a fireman-engineer craft line dispute which lay within the exclusive jurisdiction of the NMB. The court relied upon *Brotherhood of Ry. Clerks* v. *United Air Lines*, 325 F. 2d 576 (C. A. 6th 1963) discussed below. It heard no evidence on the merits or regarding the import of L&N conduct. The court failed to heed the NMB's ruling concerning the limits of its jurisdiction.

On July 22, the NMB dismissed the BLE July 1 application for the reason that "the dispute, if any exists, is not a representation dispute; but may involve an issue as to the right of the employees of one craft or class to do the work that is alleged to be that commonly done by employees in another craft or class. Procedures other than those outlined in Section 2, Ninth, of the Railway Labor Act are available to settle such disputes." (A. 35.) The Board

added that "it has no authority to decide a jurisdictional dispute as such."[1]

NMB stuck to its August 4 date for mediation, but, on that day, BLE filed suit in the District of Columbia against NMB, BLF&E, L&N and other carriers to enjoin negotiation of the BLF&E training proposal until NMB resolved an alleged "jurisdictional dispute." On April 26, 1968, the District Court granted the relief sought. The case is now on appeal before the Court of Appeals for the District of Columbia (No. 22,185 and 22,050).

2. *The second suit—implementation of the apprentice program.*

The second suit was filed on December 22, 1967, about 18 months after the first suit was dismissed. This suit, by eleven L&N firemen and the BLF&E, against L&N and BLE was based on events almost all subsequent to the dismissal of the first action. It charged a violation by L&N of its duty to bargain (A. 26) and a concerted drive by L&N and BLE to interfere with the rights of L&N employees in choice of their union representative and a drive by L&N and BLE to destroy BLF&E (A. 16 *et seq.*).

Jurisdiction was asserted under RLA Section 2, Second, Third, and Fourth. Federal question jurisdiction and jurisdiction under an act regulating commerce also were asserted (A. 14, 26).

The facts establishing violations of Sec. 2, Third and Fourth (set out at p. A-38) are:

After the apprentices had received their training, a stratagem was devised by L&N to hire them as engineers but actually to use them largely as firemen (A. 17-A. 22). First L&N unearthed and misapplied to the apprentices a long

1. The ruling of the NMB was brought to the District Court's attention during its consideration of the BLF&E motion for rehearing and new trial, denied on September 29, 1966.

disused contract provision permitting L&N to hire from other carriers experienced engineers (the "hired engineer" clause). Next, in order to give the apprentices both engineer and firemen seniority dates, certain engineer seniority rosters were needlessly and artificially enlarged for a few days, or even a few hours—just long enough to let each apprentice serve once as an engineer. Such service placed them also on the firemen's roster. The engineer's roster was then cut back, and the new "engineer" put to work as a fireman. By the stratagem, L&N in bad faith disregarded and set aside BLF&E-L&N collective bargaining agreements, regarding employment and promotion of firemen.

Nor was this all.

(1) L&N made clear to the "apprentices" that the BLE is the labor organization it favors by informing them that the apprentice program was an L&N-BLE sponsored program, and by holding graduation ceremonies and dinners inviting BLE, but not BLF&E representaives. The "apprentices" are led to infer that the BLE stands in L&N grace, that they owe a special debt to BLE for their employment and that, accordingly, it is in their interest to join BLE, even though they will spend a substantial portion of their working careers as firemen and not as engineers (A. 23).

(2) L&N has favored the "apprentices" over regular firemen by giving preferential firemen and engineer assignments to the apprentices, by creating special positions as firemen for them to prevent their furlough during slow periods, and by offering them special opportunities to work as engineers. Thus, at the East St. Louis yard a special seniority roster was established on or about November 3, 1967, for "apprentices," which will diminish the employment opportunities for firemen (A. 24). To accelerate apprentice hiring, L&N, despite its claim that there was

a shortage of engineers, has paid heavy bonuses to induce older engineers to retire (A. 22).

L&N has given BLE special opportunities to recruit the apprentices and others as BLE members. Training engineers, where possible, were BLE members and officers (A. 23). They were given an exceptional opportunity which they utilized to encourage the "apprentices" to join BLE. About Fall, 1965, prior to the establishment of the apprentice engineer program on April 28, 1966, L&N appointed a BLE local chairman (chairman of a local lodge) as head of a training program for firemen and engineers. The training program was used to demonstrate L&N's favoritism to BLE and to enable BLE to recruit members. L&N permitted firemen and engineers to attend one or more times with pay, in some cases when they would not otherwise be working. The BLE local chairman was given broad discretion in the selection of students, in the approval of expense reimbursements for attendance etc. He favored BLE members and BLF&E members who he thinks can be persuaded to shift from BLF&E to BLE (A. 24).

(3) L&N granted special favors to BLE and its members. It gave to favored BLE members extra work opportunities not given to engineers generally (A. 25). Favored members of BLE are permitted by L&N to work on behalf of BLE on L&N time and in some cases are credited for mileage not actually operated by them (A. 25). Had the L&N hired the firemen it needed in the manner it had previously done, they would have been represented by BLF&E (Par. 8, No. 18,479, A. 7a). L&N thereby sought to secure firemen whose loyalties would be with the BLE, rather than the BLF&E, and who could be counted on to vote for the BLE in any future representation election (A. 16).

(4) The L&N tactics have been effective. Approximately 64 "apprentices" purportedly have been promoted

to engineer. Only six have joined BLF&E. The bulk of the remainder have joined the BLE (A. 23). Yet the 64 are working almost entirely as firemen. Firemen who were BLF&E members have dropped such membership and joined BLE.

The facts establishing violation by L&N of its duty to bargain under Sec. 2, Second are as follows:

On March 25, 1965, BLF&E served a Section 6 notice on L&N requesting negotiation of a training program for firemen. After the L&N refused to negotiate and after services of the NMB were invoked, L&N made an agreement on April 28, 1966 with the BLE covering the same subject matter, and implemented that agreement in the manner set forth above (A. 16, A. 26).

By the acts described above and other similar conduct, the individual plaintiffs have and will continue to sustain great and irreparable injury to their right to be represented for collective bargaining purposes by the BLF&E, to their right of effective representation by BLF&E without L&N and BLE interference, influence or coercion, and to their right to work without discrimination in accordance with the collective bargaining agreement between the BLF&E and L&N. Similarly such conduct has and will continue irreparably to injure in a substantial manner the right and duty of the BLF&E to represent for collective bargaining purposes the firemen employed by the L&N.

The complaint requested injunctive relief.

The complaint in No. 18,479, like the prior complaint, was dismissed on motion for want of jurisdiction (Pltf. App. No. 18,479, A. 59a). The District Court (Plft. App. No. 18,479, 56a-58a) took the view that the complaint "essentially" alleged a dispute within the domain of NMB. The complaint was also predicated "in important part" on allegations of BLF&E-L&N contract violation. This aspect

of the controversy fell exclusively within the jurisdiction of the National Railroad Adjustment Board. In any event the suit was a relitigation of No. 17,588. The Court of Appeals affirmed. It held that the dispute was a jurisdictional dispute within the exclusive jurisdiction of the NMB. The court did not pass on the lower court Adjustment Board holding.

REASONS FOR GRANTING THE WRIT.

1. *The decision below:*

A. *Wrongly holds there is no federal jurisdiction to halt current sophisticated carrier devices to coerce employees and interfere with their choice of representation.*

B. *Deprives petitioner union of a hearing on serious charges of employer coercion in violation of due process.*

C. *Effectively negates long established holdings of this Court.*

The complaint in Case No. 18479 details for some 18 pages both the blatant and the subtle devices used by L&N to influence its employees to join a union other than BLF&E, and to destroy BLF&E (See summary pp. 7-10 above). This comprehensive catalog the court below encompasses into a single pallid, brief paragraph.[1] Even this inadequate summary demonstrates an unquestioned basis for relief. The court next disregarded long established authorities holding that a federal court has jurisdiction to grant injunctive relief on the facts alleged.

1. "The Firemen's Union contends that L&N and the Engineers' union are working together to influence prospective firemen to join the Engineers' union with the goal of eventually ousting the Firemen's union as bargaining representative of L&N firemen. It is said that apprentice engineers are being influenced to join the Engineers' union and are moving into firemen's jobs when not working as engineers. The Firemen's union seeks to enjoin the appellees from interfering with the free choice of bargaining representatives and, more importantly, to end the apprentice engineers program." 400 F. 2d 572, 575.

The leading case is *Texas & N. O. Ry. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548, 74 L. Ed. 1034 (1930). There, this Court upheld an order requiring a carrier to disestablish a company union and reinstate an independent union as the bargaining representative. At that time, Section 2, Third, prohibited "* * * interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other * * *," conduct clearly similar to that involved here.[1] Section 2, Fourth was added to the Act four years after the *Texas & N. O. Ry.* case. One of its purposes was to prevent employers from coercing employees into joining a union favored by the carrier, the very action enjoined in that case.

Texas & N. O. Ry. was reaffirmed in *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 815, 81 L. Ed. 789 (1937). There, this Court held that a federal court has jurisdiction to issue a mandatory injunction to compel a railroad to bargain with the designated representative of its employees.[2]

Both cases were cited to the court below and the distinction between the two cases at bar set out fully. Yet the Court of Appeals stated cryptically: "The second case is another attempt to have this jurisdictional dispute between two unions litigated in federal court."

We discuss below the "jurisdictional dispute" aspect of the case. But even if it be assumed *arguendo* that there was a jurisdictional dispute within the exclusive jurisdic-

1. The wording of the statute has been slightly changed and now reads "* * * interference, influence or coercion by either party over the designation of representatives by the other; * * *".

2. Other courts have ruled similarly: *Brotherhood of Railroad Trainmen* v. *Central of Ga. Ry. Co.*, 305 F. 2d 605 (C. A. 5th (1962)), holds that under Section 2, Third, a District Court has jurisdiction to enjoin a carrier from interfering with a union by bringing false charges against a union official.

tion of the NMB, NMB has no authority to protect employees from unlawful influence of their employer or to protect the petitioner union from the employer's destructive war against it. Only a federal court can grant such relief. The triad of cases cited by the court below: *Switchmen's Union* v. *Board,* 320 U. S. 297, *General Committee* v. *M. K. T. R. Co.,* 320 U. S. 323, *General Committee* v. *Southern Pac. Co.,* 320 U. S. 338, make this clear. In those cases this Court re-emphasized the right of a union to secure judicial relief for carrier violation of the Railway Labor Act. *The T. & N. O. and Virginian cases were specifically and categorically re-affirmed (See, e.g., 320 U. S. at 329 et seq., and 320 U. S. at 317).*

The result of the Sixth Circuit holding is a gross denial of due process of law. If the order of dismissal is permitted to stand petitioners will never have had a hearing on the merits. They will have been denied an opportunity to demonstrate the drastic consequences to the union and the firemen of carrier coercion and intimidation. This Court should act to protect the clear constitutional right of the petitioners to a hearing of serious charges.

"Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support." *Brinkerhoff-Faris* v. *Hill,* 281 U. S. 673, 681 (1930) (Mr. Justice Brandeis).

We ask this Court to grant review here not only to assure due process but to reinterpret and re-apply the teachings of *T & N. O.* and *Virginian* in light of present-day carrier evasive devices.

Petitioners fear that the holding below will light a path for carrier evisceration of RLA. It teaches that what cannot be done overtly can be accomplished by carrier adroitness.

2. *The decision below, contrary to a holding of this Court, and in conflict with a Fifth Circuit decision, refuses to enforce the RLA mandate to bargain and to maintain the status quo during bargaining.*

The facts before the Court establish a clear-cut violation by L&N of its duty to bargain and to maintain the *status quo*. BLF&E served a Section 6 notice upon the L&N to negotiate a training program for firemen. The L&N refused to negotiate and joined other carriers in an attempt to secure an NMB ruling that the notice was not bargainable. The NMB ruled that the notice was bargainable and docketed the request of the BLF&E for mediation. While the matter was in mediation, and more than a year after the BLF&E Section 6 notice was served, the L&N made an agreement on a similar subject matter with another union. It implemented that agreement by actions, related above, injurious to firemen represented by BLF&E and to BLF&E. Additionally it changed detrimentally the conditions of employment of firemen as they existed at the service of the BLF&E Section 6 notice.

The court below did not consider these serious charges. Its one paragraph summary of the complaint (see p. 11) makes no mention of these facts.

The court fails to refer to the arguments advanced to it by petitioners based on the RLA, opinions of this Court and opinions of other courts.

The applicable RLA provisions are Section 2, First and Second, and Section 6. In particular, Section 6 provides:

> ". . . In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, *rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon*

> *as required by Section 5 of this Act, by the Mediation Board*, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board." (Emphasis supplied.)

The case at bar is analogous to a Fifth Circuit decision, *United Industrial Workers v. Board of Trustees of Galveston Wharves*, 351 F. 2d 188 (1965). There, a collective bargaining agreement between Galveston Wharves and a union related to a grain elevator. The agreement, although it contained an expiration date, nevertheless continued indefinitely until changed pursuant to Section 6 of the Railway Labor Act (351 F. 2d at 185).

When the union served notice to open the contract for negotiation the carrier said that it had leased the elevator to an independent company and that all employees would be laid off. On the effective date of the lease, the union went on strike and simultaneously instituted an action to compel the carrier to operate the elevator until the RLA machinery for contract modification had been exhausted. The Fifth Circuit held that during the existence of a contract relationship between employer and employee and while contract modification negotiations were in progress an employer could not render the negotiations a nullity by leasing the elevator. It was required to exhaust the processes of the Railway Labor Act before doing so.

The court cited the *Fibreboard* decision of this Court in support of its position. In *Fibreboard Paper Products Corp. v. N. L. R. B.*, 379 U. S. 203, the employer and a union had a collective bargaining agreement in force expiring on July 31, 1959. The union gave timely notice of its desire to modify the contract. The company however, refused to negotiate and instead sub-contracted the work to another company. This Court held that there was a duty to bargain with the union regarding subcontracting as a

matter relating to "wages, hours, and other terms and conditions of employment" under the Labor Management Relations Act. That language it will be noted, is the LMRA analogue of the RLA "rates of pay, rules and working conditions."

Fibreboard in turn relied on a case under the Railway Labor Act, *Order of Railway Telegraphers* v. *Chicago & North Western*, 362 U. S. 330, where this Court held that a carrier had a duty under the Railway Labor Act to bargain about a system-wide abolition of certain positions then proposed by the carrier.

Galveston Wharves is the essential next step if the *Fibreboard-Telegraphers* doctrine is to have meaning where an employer does more than refuse to bargain and actively works toward union destruction. The case at bar, moreover, we submit, is indistinguishable from *Galveston Wharves*.

In the case at bar there is a contractual relationship between the firemen and the carrier regarding the employment of firemen. In accordance with decades of custom in the industry, firemen learn to be engineers while working as firemen, and are promoted to engineer in due course.

The BLF&E served notice pursuant to Section 6 of the Railway Labor Act seeking to formalize and systematize the training program. The carrier refused to negotiate, entered into a similar arrangement with another organization and seeks to destroy the fireman craft by way of all the devices set out above. In *Galveston Wharves* the employer action in one stroke, sought to destroy the jobs of the employees and with it the raison d'etre of the contract. Here, the L&N action, in time, will have the same destructive consequences. By employing "apprentices," under the benevolent auspices of the BLE agreement, the L&N-BLF&E contract remains in effect but is slowly sapped of

its vitality by the "apprentices." The craft of firemen, represented by BLF&E, faces extinction, and deprived of the life blood of new members, BLF&E is drained, more slowly to be sure, but as surely as the union in *Galveston Wharves*. This result follows because of L&N disregard of the BLF&E training proposal request and because of L&N flouting the RLA requirements for contract negotiation and maintenance of the *status quo*.

In both cases the *status quo* was seriously disturbed. "The legislative history [of the Railway Labor Act] indicated that when the rail unions and carriers agreed upon these provisions, the unions surrendered their right to strike pending exhaustion of major dispute procedures in exchange for a statutory provision restraining management from disturbing the *status quo*." *Rutland Ry.* v. *Brotherhood of Locomotive Engineers*, 2 Cir. 1962, 307 F. 2d 21, 43 (Marshall, J., dissenting). The foregoing was cited with approval in the most recent opinion of the Fifth Circuit in *Galveston Wharves*, 400 F. 2d 320, 323 (1968).

There the Court held that under RLA, a court had authority to order the discharged employees reinstated pending bargaining and to order back pay. A gulf separates *Galveston Wharves* and the case at bar: the Fifth Circuit first enforced carrier duties imposed by RLA and then fashioned a meaningful remedy. The Sixth Circuit

permits dismissal on motion, without a hearing, of a complaint alleging gross violations of substantially similar duties.

Surely, here, BLF&E is entitled to judicial relief from the extraordinary statutory violations at bar.

3. *The decision below thrusts on NMB the duty to resolve jurisdictional disputes even though no such power is conferred by statute and such task would gravely hamper NMB in performing its proper statutory duties. The decision is in the face of a specific NMB holding that it lacks power to consider such disputes generally and this claimed dispute specifically. It misapplies three 1943 decisions of this Court.*

The Court below fobs off the controversy to the NMB saying that it is but a jurisdictional dispute between labor unions and that the NMB has exclusive jurisdiction. This holding is utterly wrong and should be corrected here. The Act places on NMB two principal functions: assisting the parties in the resolution of their disputes by mediation (§ 5) and supervising the designation of collective bargaining representatives (§ 2, Ninth).

The latter NMB function relates to "representation disputes"—disputes between two rival unions as to which shall be the collective bargaining representative.

The NMB is authorized to conduct an election, or to use "any other appropriate method" to ascertain the em-

ployees' representative and then to certify such representative to the parties. If there is a bona fide representation dispute, then, as a necessary step to its resolution, the Mediation Board may determine the bargaining unit ("craft or class" to use RLA language) for purpose of an election. *Brotherhood of Ry. Trainmen* v. *NMB*, 135 F. 2d 780, 782-4 (C. A. D. C. 1943).

Once it performs these functions its statutory duties, and powers, cease.

Its authority does not extend to jurisdictional disputes *per se*, assuming for the moment, the dispute is "jurisdictional".[1] There are the most compelling reasons for confining Section 2, Ninth to its precise language.

Under Section 5, NMB is a mediator; under Section 2, Ninth, a judge. Its duty under Section 5 demands understanding and rapport with the parties; under Section 2, Ninth, it must make decisions bound to touch raw nerves. Section 2, Ninth provides that NMB may even insulate itself by appointing three neutrals to conduct the election.

It is significant that in industry generally subject to federal labor law these two functions are separated. The United States Mediation and Conciliation Service is an agency separate from the National Labor Relations Board which determines the bargaining unit.

Yet the decision below would force NMB into the maelstrom of jurisdictional contention, contrary to the statute. This Court, indeed no reviewing court other than the court below, has ever held NMB has authority in this area. Nor is this all. The decision would force NMB to make craft or class determinations in a vacuum, prematurely, *before* the parties have bargained out an apprentice program and *before* apprentice duties have been set.

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1. It is not jurisdictional in the usual sense of a dispute as to which of rival crafts shall perform certain work.

The decision below, further, is contrary to the NMB view of its authority. All parties here sought NMB assistance. NMB held it had authority to mediate the BLF&E-L&N controversy regarding the BLF&E Section 6 notice for a training program. But it held it had no authority, as requested by L&N or BLE, to decide craft or class lines, or to decide a jurisdictional dispute or such.[1] Yet this is precisely the role forced upon it by the decision below. The parties are sent to NMB, even though NMB has held it has no authority to rule on their controversy.[2]

The court below misinterpreted the 1943 triad of cases:[3] *Switchmen's Union* v. *Board*, 320 U. S. 297; *General Committee* v. *M. K. T. R. Co.*, 320 U. S. 323; *General Committee* v. *Sou. Pac. Co.*, 320 U. S. 338.

In *Switchmen's Union* this Court held simply that federal courts have no jurisdiction to review an NMB decision regarding the appropriate bargaining unit for purposes of

1. The NMB position seems clearly sound. See *Brotherhood of Trainmen* v. *NMB*, 135 F. 2d 780 (C. A. D. C. 1943), decided by Chief Judge Groner, and Judges Fred Vinson and Wiley Rutledge, which seems squarely in point. This case was cited with approval in *Switchmen's Union*, 320 U. S. 297, 301 and *MKT*, 320 U. S. 323, 336, n. 11. These cases are discussed at pp. 20-21.

2. As we noted above, the District Court for the District of Columbia, however, has directed NMB under Sec. 2, Ninth to investigate "the dispute between plaintiff [BLE] and defendant BLF&E . . . and to certify . . . whether apprentices being trained to become locomotive engineers come within the craft or class of locomotive engineers . . . or firemen . . . if either." (A. 341-2, in Court of Appeals for District of Columbia, No. 22,050.) NMB and BLF&E have appealed this decision to the Court of Appeals for the District of Columbia where it is now pending.

3. Another case cited by the Court of Appeals, is its 1963 decision in *Brotherhood of Railway & S. S. Clerks* v. *United Air Lines, Inc.*, 325 F. 2d 576, *cert. gr.* 377 U. S. 903; *cert. dismissed* as improvidently granted, 379 U. S. 26 (1964). There the Clerks represented employees of Capital Airlines which merged with United Air Lines. The Court held there was no federal jurisdiction to decide representation questions pending NMB action, or the effect of a contract provision binding the successor of Capital Airlines. The case at bar involves no such issues.

a representation election. No such question is here involved. In *MKT* the BLF&E and a carrier, with NMB as mediator, had entered into an agreement relating to emergency engineers. BLE claimed that the agreement infringed upon its rights. *Southern Pacific* raised the same issue as *MKT* and in addition raised the question of the validity of a BLF&E-carrier contract provision permitting BLF&E to handle grievance claims of BLF&E members for work done as an engineer and subject to the BLE contract. Such matters the court held were representational or jurisdictional questions removed from judicial scrutiny.

CONCLUSION.

The case at bar is not confined to issues capable of NMB resolution. The complaint here is that the railroad had refused to bargain, has seriously disturbed the *status quo*, and has used the apprentice question as a handy tool for employee coercion and union destruction. Even if it be assumed *arguendo* that NMB does have authority to decide the apprentice question, it clearly has no authority to require bargaining, to restore the *status quo* and to ban L&N from its destructive warfare against BLF&E. The L&N campaign is not confined to the apprentice matter. Rather the apprentice issue is being used by L&N as an excuse not to bargain and as a wedge to drive BLF&E off the property. Only a federal district court, armed with its plenary powers can halt the carrier depredations. As pointed out above (p. 13), this Court in the *Switchmen's Union* trilogy, emphasized the obligation of the federal courts to grant relief for carrier violations of the Act (See, *e.g.*, 320 U. S. at 329 *et seq.* and 320 U. S. at 317).

This is the aspect of the matter the Sixth Circuit failed to grasp. The decision below, if left to stand, will perpetuate endless mischief and open to carriers vast areas

of employee intimidation and union destruction if they but find a so-called "jurisdictional dispute" to act as their insulator.

We ask that the Court grant certiorari, reverse the decision below, and order a trial on the complaint.

Respectfully submitted,

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